

SERVED: March 31, 1995

NTSB Order No. EA-4335

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 21st day of March, 1995

_____)	
Application of)	
)	
HAROLD YOUNG)	
)	
for an award of attorney and)	Docket 188-EAJA-SE-13306
expert consultant fees and)	
related expenses under the)	
Equal Access to Justice Act)	
(EAJA).)	
_____)	

OPINION AND ORDER

The applicant¹ has appealed from a June 28, 1994 written decision by Administrative Law Judge William A. Pope, II, that denied his application, under the Equal Access to Justice Act ("EAJA", 5 U.S.C. § 504), for reimbursement of the legal expenses he incurred in defending himself in this proceeding.² For the

¹The applicant will hereinafter be referred to by that designation or as "Mr. Young."

²A copy of the law judge's decision on the EAJA application is attached.

reasons that follow, we will deny the appeal.³

The Administrator sought to prove by his emergency order in this action that Mr. Young, in connection with his performance of an annual inspection on a Cessna C-152, had breached maintenance standards, and had revealed inadequate competence as a mechanic, by returning the aircraft to service when corrosion on its rudder cables and its exterior metal surfaces rendered it unairworthy. Following a hearing, the law judge affirmed the Administrator's order to the extent it suspended Mr. Young's mechanic certificate and Inspection Authorization pending his successful completion of a re-examination of his competence to hold them, but reversed the order to the extent it sought a 30-day suspension of that certificate and authorization for violations based on the applicant's allegedly deficient inspection. On appeal, the Board, in NTSB Order EA-4027 (served November 23, 1993), overturned the competency re-examination suspension.

In rejecting the applicant's request for an EAJA award, the law judge concluded that the Administrator's prosecution of the matter was substantially justified because it was predicated on the "thorough and credible" testimony of an expert, percipient witness, namely, an FAA airworthiness inspector, whose opinions respecting the aircraft were supported by photographic evidence.

The law judge observed that the inspector's testimony that the aircraft exhibited more corrosion than was allowable might have been found sufficient to establish the charges if the

³The Administrator has filed a reply opposing the appeal.

Administrator had introduced some of the reference material on corrosion that the inspector relied on in making his assessment.⁴

At the same time, the law judge did not believe that the Administrator, in the absence of Board precedent on the issue, should be faulted for not recognizing a need to submit documentation setting forth an objective standard for determining the point at which corrosion becomes an airworthiness concern.

In reversing the law judge's affirmation of the re-examination request, we explained our view that since the law judge had found the evidence insufficient to prove that Mr. Young returned to service an aircraft that was unairworthy because of corrosion, something more than the evidence on which that charge was predicated was necessary to validate the challenge to Mr. Young's competence as a mechanic. Specifically, we stated (EA-4027 at 5-6):

We think that, given the law judge's dismissal of charges that essentially impugned [Mr. Young's] corrosion-detection judgment, the Administrator was obligated to have shown, by some objective measure, that [Mr. Young's] knowledge in the area of corrosion was deficient, without regard to the failed claim that the aircraft he inspected exhibited corrosion which should have grounded it. No such showing was made, for the Administrator's case rested solely on the testimony of an inspector who believed, without

⁴The applicant in this regard complains that the law judge erred by speculating that he might have reached a different result on the violation charges if the Administrator had introduced at the hearing the documentation on corrosion he submitted in response to the EAJA application. We see no error in the law judge's consideration of this material. Since the law judge had discounted the inspector's judgments on corrosion because no written material with which to gauge his opinions had been provided, the Administrator was entitled to submit, and the law judge to consider, the information referenced at the hearing.

offering any reference or source material in support of his subsequently rejected opinion, that the aircraft was not airworthy when [Mr. Young] inspected it. Since the Administrator introduced no other evidence to impugn [Mr. Young's] competence to correctly assess the impact of corrosion on an aircraft's airworthiness, we cannot find that the Administrator has established a reasonable basis for his re-examination request.

On appeal, the applicant in effect argues that since the Board concluded that there was no reasonable basis for the Administrator's re-examination request, the law judge was obligated to conclude that the Administrator's case was not substantially justified.⁵ We disagree.

The Board's conclusion that the Administrator had not shown a reasonable basis for retesting Mr. Young's competency as a mechanic did not, as the applicant appears to argue, represent a conclusion that the Administrator had not advanced sufficient evidence, in the form of the inspector's testimony, to support both the charges against him and the re-examination requirement.

We have had no prior necessity to assess the sufficiency of the

⁵As we recently observed in Application of Rafter, NTSB Order EA-4313 (served February 10, 1995), citing, slip op. at 4-5, Application of US Jet, NTSB Order EA-3817 (1993), slip op. at 2, citations omitted, "To find that the Administrator was substantially justified, we must find his position reasonable in fact and law, i.e., the legal theory propounded is reasonable, the facts alleged have a reasonable basis in truth, and the facts alleged will reasonably support the legal theory." There is no question in this case over whether the Administrator's legal theory is reasonable; that is to say, the applicant does not dispute that returning to service an aircraft unairworthy because of corrosion violates the regulations the Administrator cited. The only issue is whether there was a reasonable basis in truth for the allegations concerning existence of corrosion that affected airworthiness. That issue in this proceeding involved both fact and opinion, as it depends on expert judgments as to the seriousness of corrosion even the applicant concedes was present.

Administrator's case in that regard, for he did not appeal the law judge's rejection of the charges against Mr. Young, and our review of the re-examination request did not require a review of the adequacy of the inspector's testimony for purposes of establishing the regulatory charges. The instant application for an EAJA award does, however, obligate us to make some assessment of the evidentiary strength of the Administrator's case.

The law judge found that the inspector was a credible witness whose testimony, albeit that of an experienced expert mechanic with firsthand knowledge of the condition of an aircraft he believed was unairworthy, should not be deemed dispositive in the absence of supporting, written references on evaluating the seriousness of corrosion. While the law judge decided not to accept, without more, the inspector's opinion over that of the applicant and a witness he called as to the degree of corrosion that existed when the applicant performed maintenance on the aircraft, we have no hesitancy in concluding in the circumstances of this case that the inspector's testimony could have been found sufficient to establish the Administrator's charges.

Alphin v. NTSB, 839 F.2d 817 (1988), does not, as the applicant suggests, stand for the proposition that the Administrator cannot show substantial justification for an action that rests exclusively on the opinion testimony of an FAA inspector. Rather, it holds that the substantial justification test cannot be met by reliance on the testimony of an inspector whose opinions have been rejected by the Board as being without

merit.⁶ No such circumstance exists in this proceeding for, as noted, the Board has not previously had occasion to weigh the inspector's testimony and the law judge's decision not to accept it was based on his apparent disinclination to treat as dispositive an opinion he had no objective way to evaluate, not on any belief that the inspector's opinion on the nature and degree of the corrosion he observed was not reliable, probative or substantial. Inasmuch as the law judge's caution in this respect was not dictated by Board precedent or any other factor which the Administrator should have anticipated might undermine the sufficiency of his case, we see no reason to disturb the law judge's assessment that the inspector's testimony provided substantial justification for the certificate action.

As we find no basis in the applicant's appeal for reversing the law judge's denial of an EAJA award, his decision will be sustained.

⁶Alphin also stresses an agency's obligation to examine the record as a whole in reaching a judgment on whether the government's action was substantially justified. Such an examination in this matter reveals that the law judge found the expert opinion testimony of the parties' witnesses to be essentially in equipoise on the question of corrosion exhibited by the aircraft, and, consequently, the Administrator had not proved his case by a preponderance. Thus, while the testimony of the Administrator's expert was not persuasive enough, in the law judge's view, to tip the scales toward sustaining the violations, we think it was adequate to preclude any judgment that the Administrator had pursued a weak or tenuous case. In this regard we note, in particular, that the applicant did not attempt to establish that the inspector's opinion on corrosion clashed with any objective standard of which he or his expert witness were aware.

ACCORDINGLY, IT IS ORDERED THAT:

1. The applicant's appeal is denied, and
2. The decision of the law judge is affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, and HAMMERSCHMIDT, Member of the Board, concurred in the above opinion and order.